IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Inventor(s):	J. Ronning & K. Wical	Conf. No.	1448
Serial No.:	09/492,844	Examiner:	Yogesh C. Garg
Filed:	January 27, 2000	Group Art Unit:	3625
Docket:	D33-029-03-US	Customer No.	54,092
Title:	Apparatus and Method for Secure Downloading of Files		

COMMUNICATION

Mail Stop Appeal Brief – Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir or Madam:

This amended Appeal Brief is submitted in response to the Notice of Non-Compliant Appeal Brief dated October 17, 2007. Section III on page 2 of the Appeal Brief has been amended to state that all pending claims are on appeal. No other amendments to the Appeal Brief have been made. Applicant requests acceptance of this amended Appeal Brief for further processing by the Board of Appeals.

Respectfully submitted,

DIGITAL RIVER, INC.
By its agents:

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Date: 22 October 2007

By /Shawn B. Dempster/
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BRIEF ON APPEAL

Mail Stop Appeal Brief – Patents
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P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir or Madam:

This Appeal Brief is submitted in support of the Notice of Appeal dated April 3, 2007.

I. Real Party In Interest

The real party in interest is the assignee of record, Digital River, Inc., having an office at 9625 West 76th Street, Eden Prairie, Minnesota 55344.

II. Related Appeals, Interferences, And Judicial Proceedings

Applicant is unaware of any related pending appeals, interferences, or judicial proceedings.

III. Status Of Claims

Claims 1, 3, 8, 14 – 16, 23, 25, 30, 36 – 38, 67 and 68 are pending in the application. The pending claims are presented in the Claims Appendix of this Brief. This appeal is taken for all of the pending claims 1, 3, 8, 14 – 16, 23, 25, 30, 36 – 38, 67 and 68 which stand rejected by the Examiner in the Final Office Action dated October 3, 2006 (hereafter the "Final Office Action").

IV. Status Of Amendments

No amendment to the claims has been made since the final rejection of claims on October 3, 2006.

V. Summary of Claimed Subject Matter

The present application contains independent claims 1 and 23. These independent claims recite similar limitations, except in the context of a method performed by an electronic commerce system and the electronic commerce system itself, respectively.

Although reference numerals and specification citations are inserted below in accordance with 37 C.F.R. 41.37(c)(v), these reference numerals and citations are merely examples of where support may be found in the specification for the terms used in this section of the brief. There is no intention to suggest, in any way, that the terms of the claims are limited to these examples. Although, as demonstrated by the reference numerals and citations below, the claims are fully supported by the specification as required by law, it is improper under the law to read limitations from the specification into the claims. Pointing out specification support for the claim terminology as is done here to comply with rule 41.37(c)(1)(v) does not in any way limit the scope of the claims to those examples from which they find support. Nor does this exercise provide a mechanism for circumventing the law precluding reading limitations into the claims from the specification. In short, the reference numerals and specification citations are not to be construed as claim elements or in any way used to limit the scope of the claims.

As found in the original specification filed January 27, 2000, Figures 5A to 5C describe a flowchart for secure downloading of files. Generally, FIG. 5A describes receiving and authorization steps, FIG. 5B describes Uniform Resource Locator (URL) validation, version identification (ID) validation, and transaction ID retreival steps, and FIG. 5C describes downloading processes and downloading approval steps. It will be understood that this is a general description of FIGs 5A – 5C and that more specific support for FIGs 5A to 5C can be found on Page 13, lines 9-14; Page 14, lines 13-17; Page 15, lines 1-20; Page 16, lines 1-17; Page 17, lines 17-20; Page 19, lines 1-18;

Page 22, lines 3-22; Page 23, lines 1-22; Page 24, lines 3-22; Page 25, lines 1-21; Page 26, lines 1-7, 12-22; and Page 27, lines 4-12.

In the invention as defined in claim 1, a method 500 performed by an electronic commerce system having a server and an end user machine interacting through a network for secure downloading of a file from the network (See Page 4, lines 16-22, Page 5 lines 1-15, Page 12, lines 16-18, and Page 13, lines 9-14) is described. The method 500 in claim 1 is recited as comprising several steps. First, there is the step of receiving selection of a file via the network (Page 16, lines 9-17). Second, there is the step of receiving an order from a user for download of the selected file via the network, the order including a file identifier related to the file and an order identifier related to the order (Page 17, lines 17-27 and Page 18, lines 1-21). Third, there is the step of verifying the file identifier based upon particular information related to the file (Page 19, lines 12-18, Page 20, lines 1-31, Page 21, lines 1-22, and Page 22, lines 1-2). Fourth, there is the step of verifying the order identifier based upon particular information related to the order including (Page 22, lines 11-20) a set of sub-steps. These include determining if the order identifier is valid for the order, meaning the order identifier exists for the order (Page 22, lines 11-20). Then there is the step of determining if the order identifier is active, meaning the order was not canceled before the download of the file (Page 22, lines 11-20). Finally, there is the step of determining if the order identifier is non-suppressed, meaning the order was not canceled after the download of the file (Page 22, lines 11-20). The fifth step is selectively permitting the download of the file to the end user machine based upon the verification of the file identifier, the verification of the order identifier, and a number of attempted downloads of the file by the user (Page 25, lines 8-21, Page 26, lines 1-22, and Page 27, lines 1-12).

In the invention as defined in claim 23, an electronic commerce system having a server and an end user machine interacting through a network for secure downloading of a file from the network (Page 4, lines 16-22, Page 5 lines 1-15, Page 12, lines 16-18, and Page 13, lines 9-14) is described. The system in claim 23 is recited as comprising several parts. First, there is a selection module for receiving selection of a file via the network (Page 16, lines 9-17). Second, there is a receive module for receiving an order from a user for download of the selected file via the network, the order including a file

identifier related to the file and an order identifier related to the order (Page 17, lines 17-27 and Page 18, lines 1-21). Third, there is a file identifier module for verifying the file identifier based upon particular information related to the file (Page 19, lines 12-18, Page 20, lines 1-31, Page 21, lines 1-22, and Page 22, lines 1-2). Fourth, there is an order identifier module for verifying the order identifier based upon particular information related to the order (Page 22, lines 1120) which further includes a set of sub-parts. These include a module for determining if the order identifier is valid for the order, meaning the order identifier exists for the order (Page 22, lines 11-20). There is also a module for determining if the order identifier is active, meaning the order was not canceled before the download of the file (Page 22, lines 11-20). Finally, there is a module for determining if the order identifier is non-suppressed, meaning the order was not canceled after the download of the file (Page 22, lines 11-20). The fifth part to the system in claim 1 is a download module for selectively permitting the download of the file to the end user machine based upon the verification of the file identifier, the verification of the order identifier, and a number of attempted downloads of the file by the user (Page 25, lines 8-21, Page 26, lines 1-22, and Page 27, lines 1-12).

It will be understood that these examples are not limiting to the claim terms, and that the specification should be read as a whole to fully comprehend the scope of the claimed subject matter.

VI. Grounds Of Rejection To Be Reviewed On Appeal

Whether claims 1, 3, 8, 14-16, 23, 25, 30, 36 – 38 and 67 – 68 are unpatentable under 35 USC §103(a) over U.S. Patent 6,226,618 by Downs et al. (Downs '618) in view of U.S. Patent 5,652,786 by Rogers (Rogers '786).

VII. Argument

For the reasons described in detail below, the Examiner has failed to establish a *prima facie* case of obviousness by not providing prior art references which, when combined, teach or suggest all the claim limitations. As such, the Applicant is pursuing this appeal.

A. Failed To Present Prima Facie Case of Obviousness

To establish a *prima facie* case of obviousness under 35 U.S.C. §103(a), three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. In re Oetiker, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). See also, *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). More specifically, the Examiner bears the initial burden of presenting a prima facie case of obviousness. … Only if that burden is met, does the burden of coming forward with evidence or argument shift to the applicant. … A prima facie case of obviousness is established when the teachings from the prior art itself would appear to have suggested the claimed subject matter to a person of ordinary skill in the art. … If the examiner fails to establish a prima facie case, the rejection is improper and will be overturned. In re Rijckaert, 9 F.3d 1531,m 28 USPQ2d 1955 (Fed Cir. 1993). In re Deuel, 51 F.3d 1552, 34 USPQ2d 1210 (Fed. Cir. 1995).

In this case, the Examiner has asserted in the final office action that all of the elements of claims 1, 3, 8, 16, 23, 25, 30, 36 – 38 and 67 – 68 are taught by Downs '618. In an attempt to establish this assertion at pages 7-8 of the Final Office Action, the Examiner verbatim copied the language of presently pending independent claim 1. Rather than identifying specific elements or language of claim 1 being taught by Downs '618, the Examiner, beginning at the middle of page 8 through the top of page 11, randomly cites various passages from the Downs '618 patent. Not one of these passages is ever identified as teaching a specific feature described in claims 1, 3, 8, 16, 23, 25, 30, 36 – 38 and 67 – 68. Such random citation of passages simply does not meet the Examiner's burden to present evidence and create a written record as required by the Courts and the USPTO. See for example, In re Morris, 127 F.3d 1048, 43 USPQ2d 1753 (Fed. Cir. 1997). MPEP §706.02(j) and § 2141. Further, such conclusory statements on prior art combinations are not permitted, the Examiner must set for the rational upon which he relies. In re Lee, 277 F.3d 1338, 61 USPQ2d 1430 (Fed. Cir. 2002). In Graham v. John Deere, the Supreme Court identified four factual inquiries

that need to be done to determine obviousness under 35 U.S.C. §103(a). These inquiries are:

(a) determining the scope and contents of the prior art;

(b) ascertaining the differences between the prior art and the claims in issue;

(c) resolving the level of ordinary skill in the pertinent art; and

(d) evaluating evidence of secondary considerations.

Graham v. John Deere, 383 U.S. 1, 148 USPQ 459 (1966). More particularly, the Final Office Action fails to establish the scope and content of the prior art. Thus, the Applicant has not been provided a prima facie case of obviousness which it could rebut and all four factual inquiries could not be completed. As such, this obviousness rejection is flawed and must be overturned by the Board.

After reviewing Downs '618 for its potential teachings, the Applicant finds some teaching of an electronic file download system accessible by end users (See, for example, Figure 6) with its operations generally described in a table spanning columns 18 and 19. However, when carefully reviewing the file downloading functions described at column 68, line 47 through column 70, line 39, several features of the presently pending claims do not appear to be taught or even contemplated by Downs '618. Downs '618 generally describes a file downloading process that is initiated after an order is processed by an electronic digital content store 103 and a license file 660 file is created by clearinghouse 105. As described at column 69, lines 40-48, an end-user device 109 initiates a request for content 630 by sending the request alone with the license file 660 to a content hosting site 111. The content hosting site 111 then checks a digital signature of the license file 660 and initiates download of the content 630.

What Downs '618 fails to teach, describe, or even suggest is selectively permitting download of the file to the end user machine based upon the verification of the order identifier and a number of attempted downloads of the file by the user, as described in the language of the pending independent claims 1 and 23. As contemplated by the present claims of the invention, downloading of a file is predicated on determining at the

time of downloading the file whether an order identifier is authentic and whether the user has exceed a threshold on number of attempts to download the same file. The system described by Downs '618 is not capable of checking either criteria before initiating download of the file.

For Downs '618 to perform the order identifier verification, the content hosting site 111 would have to receive such an order identifier from the end user device 109 and compare that order identifier to something. No such comparison is described by Downs '618. At best Downs '618 describes determining whether a license file 660 is a legitimate file by checking its externally apparent characteristics (i.e., the digital signature), but nothing about analyzing the content of that license file 660 is described. Furthermore, to perform this comparison function the content hosting site 111 would also have to have independently received the order identifier directly or indirectly from the electronic digital content store 103. No such communication to the content hosting site 111 of an order identifier or status of the order itself is described by Downs '618. As such Downs '618 fails to describe the feature presently claimed in claims 1 and 23 of verifying the order identifier based upon particular information related to the order, including: (1) determining if the order identifier is valid for the order, meaning the order identifier exists for the order, (2) determining if the order identifier is active, meaning the order was not canceled before the download of the file, and (3) determining if the order identifier is non-suppressed, meaning the order was not canceled after the download of the file. Thus, Downs '618 is incapable of and does not suggest verification of the order identifier prior to permitting download a file.

For Downs '618 to check whether the user has exceed a threshold on number of attempts to download the same file, Downs '618 would have to have some way of uniquely identifying an end user device 109 and request 607 so that a count of download attempts could be kept. Downs '618 never describes receiving anything that could uniquely identify an end user device 109. Furthermore, Downs '618 does not describe any facility for storing information about download transactions so that they can be compared to future download requests from an end user device. As such, Downs '618 fails to describe the feature presently claimed in claims 1 and 23 of

permitting selectively permitting the download of the file to the end user machine based upon a number of attempted downloads of the file by the user. Thus, Downs '618 is incapable of and does not suggest checking the number of download attempts of the same file by the same user machine prior to permitting download a file.

Downs '618 also fails to teach, describe, or even suggest verifying the file identifier by verifying one or more of the following: a version identifier related to the file, a uniform resource locator for the file, or a customer identifier associated with the user as described in the language of the pending dependent claims 3 and 25.

Downs '618 also fails to teach, describe, or even suggest a step of verifying a transaction identifier associated with the order, and wherein the permitting step further includes permitting download of the file based upon the verification of the transaction identifier, as described in the language of the pending dependent claims 8 and 30.

Downs '618 also fails to teach, describe, or even suggest denying the download of the file based upon a customer identifier associated with the user, as described in the language of the pending dependent claims 16 and 38.

Downs '618 also fails to teach, describe, or even suggest permitting download of the file based upon a number of successful downloads of the file by the user, as described in the language of the pending dependent claims 67 and 68.

The Examiner recognized in the Final Office Action that Downs '618 fails to teach all elements of the present invention as claimed. Specifically, the Final Office Action admits near the top of page 11 that "Downs does not teach permitting download of the file based on a number of attempted downloads of the file by the user and a number of successful downloads of the file by the user." The Final Office Action is silent with respect to either cited reference (Downs '618 or Rogers '786) teaching or suggesting at least one other feature of the independent claims (i.e., the verification of order identifier) and the other features described in the pending dependent claims and identified above as being missing from and not suggested by Downs '618. Thus, this obviousness rejection is flawed and must be overturned by the Board.

B. Rogers '786 Is From A Non-Analogous Art May Not Be Considered Prior Art

In an attempt to overcome the limited teachings of the Downs '618 reference, the Final Office Action cites Rogers '786 with particular reference to column 6, line 33 to column 9, line 17. The Final Office Action states that Rogers '786 teaches, in analogous field of endeavor, the bill payment via a network permitting download of the file based on a number of attempted downloads of the file by the user and a number of successful downloads of the file by the user. For several reasons, the Applicant respectfully disagrees with this characterization of Rogers '786 and its use in combination with Downs '618.

In order to rely on a reference as a basis for rejection of Applicant's invention, the reference must either be in the field of Applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned. In re Oetiker, 977 F2d 1443, 1446, 24 USPQ 2d 1443, 1445 (Fed. Cir. 1992). MPEP 2141.01(a). The Final Office Action asserts beginning in the last paragraph on the bottom of page 2 and continuing through the first paragraph on page 3 that, although Rogers '786 is not from the Applicant's field of endeavor, Rogers '786 is faced with the same problem of stopping fraudulent activities online and arrives at a similar solution. This line of reasoning necessary fails because Rogers '786 does not face the same problem at all.

Applicant's invention, as claimed, relates to downloading of software over a network such as the Internet where information about an electronic order is communicated without user interaction to a download mechanism and verified before downloading is permitted. In addition, the download mechanism keeps a historical record of download attempts and permits downloading only if a threshold indicating too many attempts is not exceeded by a user attempting to download the same file multiple times.

In contrast, Rogers '786 relates to a debit card payment system having a debit card transaction approval process that detects fraud within a single transaction where a user telephones into system enters a series of identifiers such as an access code, account number, debit card numbers and dollar amounts. If the user enters any one of these codes erroneously after three attempts, the system denies the transaction and terminates the telephone call. In other words, Rogers '786 merely checks a present

transaction for user entries and if invalid terminates the present transaction. Rogers '786, unlike the present invention, does not teach keeping a historical record of prior transactions and then terminating a future transaction if a number of successful ones have been exceeded. In addition, Rogers '786 does not teach utilizing any form of information about an electronic order that is communicated without user interaction to the system for a verification process. Rogers '786 does not actually teach or suggest performing such verification before additional processing of a current transaction is permitted. Thus, Rogers '786 is not addressing the same problem at all, namely fraudulent activities in an electronic order system perpetrated by users over a multiple attempted transactions over a period of time. Therefore, Rogers '786 is not pertinent to the problem being solved and is from a non-analogous art. As such, Rogers '786 may not be relied upon as a basis for rejection of the pending claims that describe the Applicant's invention.

C. Other Considerations

In the past one method used to resolve the obviousness question with more uniformity and consistency has been the employment of a teaching, suggestion, or motivation (TSM) test, under which a patent claim is only proved obvious if the prior art, the problems nature, or the knowledge of a person having ordinary skill in the art reveals some motivation or suggestion to combine the prior art teachings. KSR International v. Teleflex Inc., 550 U.S. __ (2007). Although this test was not explicitly overturned in KSR International v. Teleflex Inc., the Court pointed out that the correct analysis involves applying common sense that familiar items may have obvious uses beyond their primary purposes, and a person of ordinary skill often will be able to fit the teachings of multiple patents together like pieces of a puzzle. Id. In the present situation, the Applicant need not apply either of these analytical tests to the obviousness question. This is because, as described previously, no prima facie case of obviousness has been made in the Final Office Action.

Even if common sense combinations of the Downs '618 and Rogers '786 references were made by one of ordinary skill in the art at the time the present invention was made, these combinations would not have resulted in the invention as claimed in independent

claims 1 and 23. In particular, neither reference teaches or suggests having a communication between an electronic store that generates an order identifier and a content hosting site that permits downloading of content. This communication is an essential part of a verification process involving that order identifier prior to permitting downloading of the content. In addition, neither reference teaches or suggests having the content hosting site keep a historical record of transactions. This historical record is an essential part of a verification process involving checking that historical record for the number of attempts of the same file by the same user.

The judgment of obviousness made in the Final Office Action based on these references appears to take into account more knowledge than what was within the level of ordinary skill in the art at the time the claimed invention was made, and appears to include additional knowledge gleaned only from the Applicant's disclosure (i.e., improper use of hindsight, see supra KSR International v. Teleflex Inc). These gaps in the teachings of these references simply can not be bridged by common sense alone. The gist of the present invention as claimed lies within these gaps. As such, this obviousness rejection is flawed and must be overturned by the Board.

With respect to the remaining dependent claims, if an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Claims 3, 8, 14-16, and 67 depend from claim 1 and therefore are allowable over Downs '618 and Rogers '786 for the same reasons that claim 1 is allowable. Claims 25, 30, 36-38, and 68 depend from claim 23 and therefore are allowable over Downs '618 and Rogers '786 for the same reasons that claim 23 is allowable. Furthermore, as previously noted claims 3, 8, 16, 25, 30, 38, 67 and 68 recite additional features that independently render them patentable over Downs '618 and Rogers '786.

Therefore, under 35 USC §103(a) Downs '618 and Rogers '786 fail to teach the present invention as claimed in claims 1, 3, 8, 14-16, 23, 25, 30, 36-38, 67 and 68 and a withdrawal of this objection is respectfully requested.

VI. Conclusion

On the basis of the foregoing, Applicant respectfully submits that all of the rejections made in the Final Office Action should be overturned and claims 1, 3, 8, 14-16, 23, 25, 30, 36-38, 67, and 68 should be passed to issuance. Applicant respectfully requests that a timely Notice of Allowance be issued in this case.

Respectfully submitted,

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Date: 22 October 2007

By /Shawn B. Dempster/
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IX. Claims Appendix

1. (Previously Presented): A method performed by an electronic commerce system having a server and an end user machine interacting through a network for secure downloading of a file from the network, the method comprising steps of:
receiving selection of a file via the network;
receiving an order from a user for download of the selected file via the network, the order including a file identifier related to the file and an order identifier related to the order;
verifying the file identifier based upon particular information related to the file;
verifying the order identifier based upon particular information related to the order, including:
determining if the order identifier is valid for the order, meaning the order identifier exists for the order;
determining if the order identifier is active, meaning the order was not canceled before the download of the file; and
determining if the order identifier is non-suppressed, meaning the order was not canceled after the download of the file; and
selectively permitting the download of the file to the end user machine based upon the verification of the file identifier, the verification of the order identifier, and a number of attempted downloads of the file by the user.

2. (canceled)

3. (Previously Presented) The method of claim 1 wherein the verifying the file identifier step includes verifying one or more of the following: a version identifier related to the file; a uniform resource locator for the file; or a customer identifier associated with the user.

4-7. (canceled).

8. (Previously Presented) The method of claim 1 further including a step of verifying a transaction identifier associated with the order, and wherein the permitting step further includes permitting download of the file based upon the verification of the transaction identifier.

9-13. (canceled)

14. (Previously Presented) The method of claim 1 further including a step of displaying a default identification as a file name for storing the file based upon an identification of the file.

15. (Presented Presented) The method of claim 14 further including a step of transmitting the generated file identifier for display to the user.

16. (Previously Presented) The method of claim 1 wherein the permitting step includes denying the download of the file based upon a customer identifier associated with the user.

17-22. (canceled)

23. (Previously Presented) An electronic commerce system having a server and an end user machine interacting through a network for secure downloading of a file from the network, comprising:

a selection module for receiving selection of a file via the network;

a receive module for receiving an order from a user for download of the selected file via the network, the order including a file identifier related to the file and an order identifier related to the order;

a file identifier module for verifying the file identifier based upon particular information related to the file;

an order identifier module for verifying the order identifier based upon particular information related to the order, including:

a module for determining if the order identifier is valid for the order, meaning the order identifier exists for the order;

a module for determining if the order identifier is active, meaning the order was not canceled before the download of the file; and

a module for determining if the order identifier is non-suppressed, meaning the order was not canceled after the download of the file; and

a download module for selectively permitting the download of the file to the end user machine based upon the verification of the file identifier, the verification of the order identifier, and a number of attempted downloads of the file by the user.

24. (canceled)

25. (Previously Presented) The electronic commerce system of claim 23 wherein the file identifier module includes a module for verifying one or more of the following: a version identifier related to the file; a uniform resource locator for the file; or a customer identifier associated with the user.

26-29. (canceled)

30. (Previously Presented) The electronic commerce system of claim 23 further including a module for verifying a transaction identifier associated with the order, and wherein the permission module further includes a module for permitting download of the file based upon the verification of the transaction identifier.

31-35. (canceled)

36. (Previously Presented) The electronic commerce system of claim 23 further including a module for displaying a default identification as a file name for storing the file based upon an identification of the file.

37. (Previously Presented) The electronic commerce system of claim 36 further including a module for transmitting the generated file identifier for display to the user.

38. (Previously Presented) The electronic commerce system of claim 23 wherein the download module includes a module for denying the download based upon a customer identifier associated with the user.

39-66. (canceled)

67. (Previously Presented) The method of claim 1 wherein the permitting step further includes permitting download of the file based upon a number of successful downloads of the file by the user.

68. (Previously Presented) The electronic commerce system of claim 23 wherein the permission module further includes a module for permitting download of the file based upon a number of successful downloads of the file by the user.

X. Evidence Appendix

No evidence under 37 C.F.R. §1.130, 1.131, or 1.132 is being relied upon. The evidence relied upon is reflected in the following table.

Reference	Entered in Record
Downs et al., U.S. Patent 6,226,618	PTO-892 attached to Office Action mailed November 20, 2002
Rogers, U.S. Patent 5,652,786	PTO-892 attached to Office Action mailed June 29, 2005

A copy of the above-noted evidence is attached hereto.

XI. Related Proceedings Appendix

None.